with "deportation,"

No. 10185

Haggar v. Helvering 308, U.S. /3

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors of the Estate of FREDERICK L. BROWN, Deceased,

Appellees.

REPLY BRIEF OF APPELLEES.

CLARK J. MILLIRON,
518 Fidelity Building, Los Angeles,
Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles

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No. 10185

IN THE

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UNITED STATES OF AMERICA,

Appellant,

vs.

AUSTEN G. BROWN and MARIAN B. KENYON, Executors of the Estate of FREDERICK L. BROWN, Deceased,

Appellees.

REPLY BRIEF OF APPELLEES.

JURISDICTION.

This is an action for the recovery of estate taxes paid. The complaint, filed February 13, 1941 [R. 1-35], alleges that the taxes were wrongfully exacted and that the claim for refund, filed December 15, 1939, was rejected on April 1, 1940 [R. 7-8]; also, that the action is brought under Section 24 (20) of the Judicial Code, as amended. (U. S. C., Title 28, Sec. 41 (20).) [R. 2.] The case is brought to this Court by notice of appeal filed February 25, 1942 [R. 55], from the judgment of the District Court entered November 25, 1941. [R. 53-54.] The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended. (U. S. C., Title 28, Sec. 225.)

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether, under the provisions of Sec. 302(c) of the Revenue Act of 1926, any portion of the value of the corpus of an irrevocable trust created in 1923 was includable in the gross estate of the trustor who died in 1934, where the trust was not created in contemplation of death, and where the trustor retained no interest whatsoever in the corpus, nor any right or power to in any way alter or amend the trust or any of the terms thereof, and where the trustor made no provision whatsoever for any retention or reversion of any part of the corpus, but reserved only the right to receive a portion of the income therefrom during his life.

(2) Whether the retroactive application of the amendment of March 3, 1931, made to Section 302(c) of the Revenue Act of 1926, would be in violation of the Fifth Amendment of the Constitution of the United States.

STATUTE INVOLVED.

The statute involved is Section 302(c) of the Revenue Act of 1926. The text of this section so far as here applicable is set forth in the appendix hereto at page 59. Subsequent amendments to this section by the Joint Resolution of March 3, 1931, and by Section 803(a) of the Revenue Act of 1932 are also set forth in the appendix at page 60.

STATEMENT OF THE CASE.

The taxpayers are the executors of the last will and testament of Frederick L. Brown, who died on the 8th day of August, 1934, at the age of 67 years. On August 15, 1923, the decedent and his wife, who is now also deceased, having died in 1940, created an irrevocable trust whereby he transferred to himself and their two sons (Walton Brown and Austen G. Brown) as trustees, 130¼ shares of capital stock of Gardena Syndicate, then owned by the decedent. [R. 45-48.]

The trust indenture provided that the decedent should receive the first $30,000 of the trust income. Thereafter, the trustees were to pay him during his life $500 per month out of income. A similar monthly income was then to be paid to his wife. Subject to an accumulation to secure the foregoing payments, the balance of the income was distributable mainly to their three children. [R. 21-23, 48.] In accordance with these provisions of the trust agreement, the decedent actually received during his lifetime 31 per cent of the total trust income. [R. 14-15.]

The trust was to terminate upon the death of the survivor of the decedent and his wife. Thereupon, the corpus was to vest absolutely in equal shares in their children, if living, otherwise in the grandchildren or their issue. If any child should then be dead, his share was to vest in his issue and spouse in stated proportions. In default of issue or spouse the share would vest as if that child had not been named as a remainderman. [R. 24-25.]

No reversionary interest of any kind was reserved in the trust instrument.

No right of alteration or amendment, or other right of revocation or control was retained by the decedent or his wife, either alone or with any other person. The trust was in full force at the time of the decedent's death in 1934. It terminated according to its terms upon the death of the wife, on February 8, 1940. [R. 46-47.]

The estate tax return filed by the executors in 1935 with the Collector of Internal Revenue for the Sixth District of California, disclosed no estate tax to be due. The Commissioner of Internal Revenue thereafter determined a deficiency in the estate tax of $9,534.60, including interest. This resulted from the inclusion in the gross estate of the value ($142,552.05) of 31 per cent of the 130¼ shares of stock of the Gardena Syndicate, which the decedent had transferred in trust in 1923. The Commissioner's action was based upon Section 302(c) of the Revenue Act of 1926, as amended. [R. 48-49.] The executors paid the tax and interest on March 1, 1937.

In April, 1940, the Commissioner rejected a claim for refund filed the preceding December. This suit was then filed, and resulted in a judgment in favor of the taxpayers. The District Court concluded that the decedent had not made a transfer in contemplation of death or intended to take effect in possession or enjoyment at or after death. The United States thereupon took this appeal. [R. 49-50.]

SUMMARY OF ARGUMENT.

I. The issues in this case are controlled by the interpretation and application of Section 302(c) of the Revenue Act of 1926 as it stood prior to the amendment by the joint resolution of March 3, 1931.

II. The controlling principle of law announced and followed in a long line of Supreme Court decisions is that no part of the value of property transferred in trust prior to March 3, 1931, not in contemplation of death, is includable in gross estate under Section 302(c) of the Revenue Act of 1926 if such transfer was absolute and complete when made, even though the grantor reserved to himself the income from the property for life.

III. The transfer of the interest here involved was complete when made, and no part of the value of that interest is includable in the grantor's gross estate. The reservation by the grantor of a portion of the trust income for his life is of no significance inasmuch as Section 302(c) of the Revenue Act of 1926, as it read prior to the amendment of March 3, 1931, is controlling.

IV. The appellant's conclusions are not based upon facts and are not supported by the authorities cited.

ARGUMENT.

I.

The Issues in This Case Are Controlled by the Interpretation and Application of Section 302(c) of the Revenue Act of 1926 as It Stood Prior to the Amendment by the Joint Resolution of March 3, 1931.

Section 302(c) of the Revenue Act of 1926 [Appendix p. 59] provides, so far as here pertinent, that the value of a decedent's gross estate shall be determined by including the value at the time of death of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise intended to take effect in possession or enjoyment at or after his death.

That section was amended by the Joint Resolution of March 3, 1931 [Appendix p. 61], so as to enlarge the scope of 302(c) to include in gross estate the value of an interest in property transferred in trust when coupled with the retention by the grantor of the right to the income for his life. The substance of this amendment was subsequently incorporated in Sec. 803(a) of the Revenue Act of 1932 [Appendix p. 60]. These amendments, however, were prospective and not retroactive in their application. They do not apply to transfers completed prior to March 3, 1931.

The Joint Resolution was adopted because, on the preceding day, March 2, 1931, the Supreme Court had held in *Burnet v. Northern Trust Company*, 283 U. S. 782, 75 L. Ed. 1412, *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412, and *McCormick v. Burnet*, 283 U. S. 784,

75 L. Ed. 1413, that the transfer of property in trust coupled with a reservation of income to the grantor for life was not a transfer intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of Sec. 302(c) of the Revenue Act of 1926 or corresponding prior statutory provisions.

The text of the proceedings on the floor of the House [set forth in full at p. 61 of the Appendix herein] demonstrates that the amendment was not a clarifying amendment but operated to change the existing law; and that the amendment was intended to operate prospectively and not retroactively.

From the statements made and the discussion on the floor of the House at the time of the passage of the Resolution, we quote:

> "Mr. Hawley. * * * the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his heirs—the Supreme Court held that it goes to his heirs free of any estate tax.
>
> "This resolution is to provide that hereafter such shall not be the law." * * *
>
> "It provides that hereafter no such method shall be used to evade the tax" * * *
>
> "Mr. Garner. * * * The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it."
>
> Congressional Record—House, pp. 7198, 7199, March 3, 1931.

The Commissioner of Internal Revenue, on May 22, 1931, in a Treasury decision signed by himself and by the Secretary of the Treasury, ruled on this point as follows:

> "In view of the decisions of the Supreme Court of the United States in *Nichols v. Coolidge* (274 U. S. 531, (T. D. 4072, C. B. VI-2, 351)), *May v. Heiner* (281 U. S. 238, (Ct. D. 186, C. B. IX-1, 382)), *Coolidge v. Long* (282 U. S. 582), *Burnet v. Northern Trust Co.* (51 S. Ct. 342), *Edgar M. Morsman, Jr. v. Burnet* (51 S. Ct. 343), and *Cyrus H. McCormick v. Burnet* (51 S. Ct. 343) the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10:30 p. m. Washington, D. C., time, March 3, 1931.
>
> "Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."
>
> T. D. 4314, C. B. X-1; 450-451.

This Treasury Decision has never been modified or rescinded.

In *Hassett v. Welch,* 303 U. S. 303, 82 L. Ed. 858, and *Helvering v. Bullard,* 303 U. S. 297, 82 L. Ed. 582, the Supreme Court held that these amendments were prospective and not retroactive in their application and did not apply to transfers in trust completed prior to March 3, 1931. See also *Bingham v. United States,* 296 U. S. 211, 80 L. Ed. 160.

Although decedent died on August 8, 1934, the Revenue Act of 1934, effective May 11, 1934, made no change in Section 302(c) of the 1926 Act. Therefore, at the time of decedent's death, the statutory provisions of Section 302(c) of the Revenue Act of 1926 were still in effect, so far as transfers in trust completed prior to March 3, 1931 were concerned. The transfer herein involved was completed on August 15, 1923 [Tr. pp. 19, 39, 46, 51].

Appellant apparently is not here contending for a retroactive application of the two amendments (App. Br. p. 10) although the statements in its brief on this point are not clear.

It would appear therefore that the parties to this controversy are in agreement that the issues in this case are controlled by the interpretation and application of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment of March 3, 1931. But, regardless of whether or not the parties are in agreement on this point, Section 302(c) as it read prior to the amendments is the controlling statute here involved.

However, if appellant's brief be construed to contend that the above mentioned amendments of 1931 and 1932 should be applied retroactively to the present case, such application would be in violation of the 5th Amendment to the Constitution of the United States.

> *Nichols v. Coolidge,* 274 U. S. 531, 71 L. Ed. 1184;
>
> *Blodgett v. Holden,* 275 U. S. 142, 72 L. Ed. 206;
>
> *Untermeyer v. Anderson,* 276 U. S. 440, 72 L. Ed. 645;
>
> *Coolidge v. Long,* 282 U. S. 582, 75 L. Ed. 562.

II.

The Controlling Principle of Law Announced and Followed in a Long Line of Supreme Court Decisions Is That No Part of the Value of Property Transferred in Trust Prior to March 3, 1931, Not in Contemplation of Death, Is Includable in Gross Estate Under Section 302(c) of the Revenue Act of 1926 if Such Transfer Was Absolute and Complete When Made, Even Though the Grantor Reserved to Himself the Income From the Property for Life.

In order to demonstrate the accuracy of the foregoing statement we will review, briefly, the decisions dealing with this point.

Gaither v. Miles (1920), 268 Fed. 692:

The underlying principle followed by the Supreme Court in the cases hereinafter referred to, was first announced in 1920 by the District Court of Maryland in *Gaither v. Miles.* That Court held, on the one hand, that one insurance policy and one endowment policy were includable in the gross estate because, in the case of the insurance policy, the decedent had reserved to himself the right to change the beneficiary, and in the case of the endowment policy, which he had assigned, he had reserved, in the assignment, the right to obtain the proceeds upon maturity, if living.

On the other hand, with respect to three other policies of insurance, the Court held that since the decedent had reserved no right or interest thereto in himself and had reserved no right to change the beneficiaries, the value of such policies was not includable in the gross estate. In the one case the decedent had reserved a "string" to

his gift. In the other case he had not. This decision is of interest, not only as the forerunner of the subsequent decisions hereinafter referred to, but also because it is cited with approval in *Helvering v. LeGierse* (1941), 312 U. S. 531, 542, 85 L. Ed. 996, 1000. The rule established in *Gaither v. Miles* has not been altered by any subsequent decision which we have been able to locate; and its recent citation by the Supreme Court in *Helvering v. LeGierse* undoubtedly adds to its weight.

Shukert v. Allen (1927), 273 U. S. 545, 547-548, 71 L. Ed. 764, 766-767:

This case involved a transfer by the decedent on May 5, 1921 in trust with the income to be accumulated for a period of thirty years, whereupon the principal and undistributed income were to be divided among the decedent's children. Shukert died September 29, 1921, a few months after the creation of the trust. There was no contention that the trust was created in contemplation of death. The Government's theory was that since the term of the trust extended far beyond the normal life expectancy of the grantor, the transfer fell literally within the terms of the statute and was intended to take effect in possession or enjoyment at or after death. This was the sole issue in the case. The statute involved was Section 402(c) of the Revenue Act of 1918, which is identical with Section 402(c) of the Revenue Act of 1921, (in effect in 1923 when the instant trust was created) and which is similar to Section 302(c) of the Revenue Act of 1926. The Court said:

> "The transfer was immediate and out and out, leaving no interest remaining in the testator. The

trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the circuit court of appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust" (p. 547).

"But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death" (p. 548).

This decision was unanimous.

Nichols v. Coolidge (1927), 274 U. S. 531, 71 L. Ed. 1184:

In 1917 Julia Coolidge transferred two residences in fee to her five children taking back, simultaneously, a lease on the conveyed premises. Because it was the intention of the parties that the grantor should enjoy the use of the premises as long as she lived, the Government sought to include the value of the property in the gross estate of the grantor, when she died in 1921. The Court held that the transfer was absolute; that the right to possess and enjoy the property did not depend upon death; and that the value of property was not includable in the gross estate. The Court also held, on constitutional grounds, that certain other property trans-

ferred in trust by Mrs. Coolidge and her husband in 1907 with the reservation of the income for life to the grantors, the corpus then to be distributed to their five children, was not subject to estate tax.

This decision was unanimous.

Saltonstall v. Saltonstall (1928), 276 U. S. 260, 72 L. Ed. 565:

The question there involved was the imposition of state inheritance taxes. The Court held that if the right to alter the trust remained in the donor until his death, the corpus of the trust was subject to state inheritance tax.

This decision was unanimous.

Chase National Bank v. United States (1929), 278 U. S. 327, 73 L. Ed. 405:

In this case, decided January 2, 1929, certain life insurance policies taken out by decedent on his own life named his wife as beneficiary, but reserved, to the insured, the right to change the beneficiary. The Court held that the reserved right to change the beneficiary left the transfer incomplete until death and made the proceeds of the policies subject to estate tax, as a transfer intended to take effect at death.

This decision was unanimous.

Reinecke v. Northern Trust Co. (1929), 278 U. S. 339, 346, 348-349, 73 L. Ed. 410, 414, 415:

This case, decided January 2, 1929, the same day as *Chase National Bank v. United States, supra*, involved two separate sets of trusts; the "two trusts" and the "five trusts". As to the "two trusts", decedent created

the trusts, reserving the income to himself for life and reserving also a power of revocation exercisable by himself alone. The Court held the corpora of the two trusts were subject to estate tax, citing *Chase National Bank, supra*, on the premise that a transfer made subject to a power of revocation in the transferer, terminable at his death, is not complete until his death.

As to the "five trusts", the grantor created life interests in the income in others than himself continuing until specified times after his death. He reserved to himself certain powers with regard to the transferred properties. A power was reserved to alter, change or modify the trusts only with the consent of beneficiaries.

Answering the Government's contention that these powers made the trust taxable in the estate of the decedent, the Court said:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
>
> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts

were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax" (pp. 346-7).

The Court then continued with language which, in large part, constituted its later opinion in *May v. Heiner*, 281 U. S. 238, 74 L. Ed. 826, and which, for that reason, is of significance. The Court said:

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.
>
> "It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment and insurance polices effected by the decedent on his own life, payable to his estate or to others at his death. The two sections read together indicate no purpose to tax completed gifts made by the donor

in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53; United States v. Merriam, 263 U. S. 179, 187, 68 L. Ed. 240, 29 A. L. R. 1547, 41 Sup. Ct. Rep. 68" (pp. 348-349).

This decision was unanimous.

May v. Heiner (1930), 281 U. S. 238, 242, 243, 74 L. Ed. 826, 827, 828:

The facts are stated in the opinion as follows:

"By a written instrument dated October 1, 1917, Pauline May, wife of Barney May, 'transferred, set over and assigned,' to him and others, as trustees (with power to change the investments), certain described securities—bonds, notes, corporate stocks, and money—in trust, to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance 'to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said trust, in whatever form or shape it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among 'her four children, their distributees, or appointees'" (p. 242).

The Commissioner claimed that the principal of the trust fund could not take effect in possession or enjoyment until at or after death; that according to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death; that the gift of the principal, therefore, could not take effect during decedent's lifetime; and that the case came literally within the terms of the statute.

The Supreme Court, in reversing the courts below, said:

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event" (p. 343).

This decision of the Court was unanimous.

> *Burnet v. Northern Trust Co.* (March 2, 1931), 283 U. S. 782, 75 L. Ed. 1412;
>
> *Morsman v. Burnet* (March 2, 1931), 283 U. S. 783, 75 L. Ed. 1412;
>
> *McCormick v. Burnet* (March 2, 1931), 283 U. S. 784, 75 L. Ed. 1413.

Closely following *May v. Heiner, supra,* the Supreme Court decided, on March 2, 1931, three cases: *Burnet v. Northern Trust Co.*, *Morsman v. Burnet*, and *McCormick v. Burnet,* all of which involved transfers in trust with income for life reserved in the grantors. By per curiam

decisions the Court held the transfers were *not* includable in the gross estate as being effective at or after death, citing *May v. Heiner* as controlling.

These decisions were unanimous.

(The day after these decisions were handed down by the Supreme Court, Congress, on the last day of the current session (March 3, 1931), passed a joint resolution amending Section 302(c) of the Revenue Act of 1926 *prospectively* so as to include in the gross estate of a decedent property transferred in trust with a reservation of a life estate (or income for life) to the grantor. In the discussion of the amendment on the floors of the House and Senate, it was definitely stated by the sponsors that the amendment was not retroactive but was prospective only and was not intended to affect any trust theretofore created. Congressional Record, March 3, 1931, pp. 7198, 7199. [Appendix p. 61. See also pp. 7 of this brief.]

Klein v. United States (1931), 283 U. S. 231, 75 L. Ed. 996:

In this case, decided April 13, 1931, the decedent had transferred land to his wife during the term of her life and provided that if she should die prior to the death of the grantor she should take no greater estate and the reversion in fee would remain vested in the grantor, such reversion being thereby reserved; and further providing that should the grantee survive the grantor, in that case only, she should hold the land in fee simple. The Supreme Court held that the grantor had reserved to himself the fee in the land until his death; that the transfer was not complete until his death, and that the property was subject to estate tax.

The *Klein* case is of importance not only because it was pending before the Court when the three decisions of March 2, 1931, referred to above were announced, but also because, later, in *Helvering v. Hallock,* 309 U. S. 106, 84 L. Ed. 604 (the case most strongly relied upon by the appellant in the case at bar) the Supreme Court stated that the *Klein* case furnishes the "harmonizing principle". It should be noted, therefore, that *in the Klein case, the grantor reserved to himself a "string" by which he held the ultimate disposition of his property in suspense until the moment of his death,* while in the three decisions of March 2, 1931 no such control was retained even though the grantors therein did retain the trust income for life.

The decision in the *Klein* case was unanimous.

Porter v. Commissioner (1933), 288 U. S. 436, 77 L. Ed. 880.

In this case, decided March 13, 1933, the trustor created certain trusts, in each of which there was "a paragraph reserving to the donor power at any time to alter or modify the indenture and any or all of the trusts in any manner, but expressly excepting any change in favor of himself or his estate." (p. 439.)

The "string" here was the power to take from the named beneficiaries and substitute others.

The Court said:

> "His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, a source of valuable assurance passing from the dead to the living." (p. 444.)

This decision was unanimous.

Helvering v. St. Louis Union Trust Co. (1935), 296 U. S. 39, 45. 46-47; 80 L. Ed. 29, 33, 34.

On November 11, 1935, the Supreme Court decided the case of *Helvering v. St. Louis Union Trust Company.* In this case property was transferred in trust, the income to be paid to the daughter of the grantor, with a provision that at the death of the daughter, if the grantor be living, the trustee was to transfer and deliver the property to the grantor. The majority opinion of the Supreme Court held the remainder was vested subject only to being divested by a condition subsequent which never occurred, and that the provisions in the trust by which the property was contingently to revert to the trustor was not sufficient to subject the property to tax under Section 302(c) of the Revenue Act of 1923.

The majority opinion stated:

> "Unlike the Klein case, where the death was the generating source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it." (pp. 45-6.)

Four justices dissented and in the dissenting opinion stated (p. 47):

> "It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter. If he had reserved a power to revoke the trust, if he survived her, Reinecke v. Northern Trust Co., 278 U. S. 339, 73 L. ed. 410, 49 S. Ct. 123, 66

A. L. R. 397, *supra,* would have made the gift taxable, as would Klein v. United States, 283 U. S. 232, 75 L. ed. 998, 51 S. Ct. 398, *supra,* if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

"Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not form." (Citing cases.) "However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. The extent to which it is incomplete marks the extent of the 'interest' passing at death, which the statute taxes." (p. 47.)

(The principle thus announced was subsequently followed by the majority of the Court in *Helvering v. Hallock,* 309 U. S. 106 (hereinafter discussed), that where the grantor selects a device—a "string"—by which he retains a right to determine the ultimate disposition of his property until the moment of his death, the gift is incomplete until his death and hence the value thereof is includable in the gross estate under Section 302(c).)

Thus the majority opinion held the transfer in trust to be final and complete when made and hence the value of the property was not includable in the gross estate, while the minority took the view that because of the "string" retained by the grantor the gift was not final and complete, until the moment of death.

Becker v. St. Louis Union Trust Co. (1935), 296 U. S. 48, 50, 89 L. Ed. 35, 37.

In this case, decided on the same day as *Helvering v. St. Louis Union Trust Co.,* the grantor, in 1921, created four trusts, one in favor of each of his four children, reserving to himself a reversion in the event the beneficiaries should predecease him. The majority opinion of the Court held, in conformity with *Helvering v. St. Louis Union Trust Co.,* that the reservation in the trust instrument of a reversion, being based upon a contingency which never happened, did not operate to bring the trust corpus within the grantor's gross estate; while the minority opinion held that the reservation in the trust instrument of a contingent reversionary interest was a "string" which made the gift incomplete until death, and thus operated to bring the value of the corpus within the gross estate.

Helvering v. Bullard (1938), 303 U. S. 297, 82 L. Ed. 852.

In this case, decided February 28, 1938, the decedent had created a trust in 1927 which, in 1932, was declared void in an adversary court proceeding, pursuant to stipulation of the parties. Decedent created a new trust on February 12, 1932, reserving to herself a life interest in the income. The grantor died subsequently and the value of the corpus of the trust was included by the Commissioner of Internal Revenue in the decedent's gross estate. The Court held that the trust property was property from the 1932 trust and since the 1932 trust was created

after the adoption of the Joint Resolution of March 3, 1931, with the reservation of a life interest in the income, the *amendment* operated to bring the value of the corpus within the gross estate.

This decision was unanimous.

Hassett v. Welch (1938), 303 U. S. 303, 82 L. Ed. 858.

Decedent died November 20, 1932. In 1924 he had created a trust, reserving the trust income to himself for life, directing division of the trust income after his death between nephews and nieces, and providing for distribution of the corpus upon the death of the survivor of them amongst their then living issue. The Commissioner included the value of the trust corpus in decedent's gross estate holding that the transfer was intended to take effect in possession and enjoyment at or after death within the meaning of Section 302(c) of the Revenue Act of 1926. The Government contended further, that since the decedent died after the adoption of the Joint Resolution of March 3, 1931, the joint resolution and the subsequent embodiment thereof in Section 803(a) of the Revenue Act of 1932, were controlling.

The Court, in an exhaustive analytical opinion, held that the 1931 and 1932 amendments were prospective and not retroactive in their application; that the amendments did not apply to transfers in trust which were final and complete prior to March 31, 1931, the effective date of the Joint Resolution; and that the value of the trust corpus was not includible in the gross estate.

The decision was unanimous.

Helvering v. Hallock (1940), 309 U. S. 106, 110, 84 L. Ed. 604, 608.

Three cases were considered together in this opinion promulgated on January 29, 1940,—the *Hallock* case, the *Huston* case and the *Bryant* case. Each of these cases involved disposition of property by way of trust created prior to the effective date of the joint amendment of March 3, 1931. The grantor reserved to himself *in the trust instrument* a right of reversion of the trust corpus if he survived the life beneficiary. The Court stated that all three of the cases:

> "involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' *by reason of that which he retained,* is the crux of the problem." (p. 110.) (Italics added.)

The Court thus recognized the problem as involving a state of facts where the grantor had retained *in the trust instrument* a contingent right of reversion terminable at his death, or, in other words, a case where the grantor retained a "string" to his gift.

The Court was confronted, however, by its prior decisions in *Helvering v. St. Louis Union Trust Co.,* 296 U. S. 39, and *Becker v. St. Louis Union Trust Co.,* 296 U. S. 48 (both decided November 11, 1935), wherein a divided Court had drawn a distinction between those cases where the reversionary interest reserved in the trust instrument would come into effect only upon the happening of a condition subsequent and those cases where the re-

versionary interest reserved in the instrument was vested in the grantor, subject to be defeated only upon the happening of a future event. The majority opinion in those two prior cases had held that if the "string" was tied to a condition subsequent the effect was different from that where the "string" was tied to a condition precedent.

The Court in discussing the two *St. Louis Union Trust Co.* cases, and the *Klein* case, said:

> "In none of the three cases did the dominion over property which finally came to the beneficiary fall by virtue of the grantor's will, except by his provision that his own death should establish such final and complete dominion." (p. 114.)

The Court, further referring to the *Klein* case, said:

> "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor." (p. 112.)

The Court then stated:

> "Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of Sec. 302(c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the St. Louis Union Trust Co. cases, the Klein case furnishes such a harmonizing principle." (p. 118.)

The Court, in concluding its opinion, stated:

> "The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further ex-

amination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the St. Louis Union Trust Co. cases in applying the Klein doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere." (p. 122.)

The Court thus made it clear that it was following the precedent set by the long line of cases leading up to and followed in the *Klein* case, but that it was unwilling to follow the technical "diversities" of the two St. Louis Union Trust Co. cases. Hence it overruled those two cases, leaving in effect the rule established by the prior cases.

The Court did not overrule *Hassett v. Welch* either by implication or otherwise, inasmuch as that case merely followed the same rule set forth in the Court's prior unanimous decisions in the *Klein* case and in *May v. Heiner, Burnett v. Northern Trust Co., Morsman v. Burnet* and *McCormick v. Burnet,* namely, that where the grantor retains in the instrument of transfer a "string" to his gift, whereby he may control the ultimate disposition of his property until the moment of his death, the transfer is not complete and hence is intended to take effect in possession or enjoyment at or after his death, but, conversely, where the transfer is absolute when made, without the reservation of any "string," the gift is complete when made and is not intended to take effect in possession or enjoyment at or after death.

*   *   *   *   *   *   *   *   *

It will be observed that the foregoing cases may be classified into two distinct groups; the first, those wherein trust provisions having to do with disposition of corpus are considered, and, the second, those wherein the case turns on a trust provision dealing with the distribution of income.

In the first group are found those cases wherein particular "strings" render the transfers incomplete and serve to bring the case within the statute, for example, the reserved right to change the beneficiary and to receive proceeds of an endowment policy (*Gaither v. Miles, supra*); the reserved right to revoke a trust and recover the corpus (*Reinecke v. Northern Trust Co., supra*); a retention of a reversionary interest to pass only on the death of the grantor prior to that of the life beneficiary (*Klein v. United States, supra*), and the reservation of a possibility of reverter in the event the life beneficiary predeceased the grantor (*Helvering v. Hallock, supra*).

In the second group various trust provisions affecting distribution of income were under consideration, such as one for accumulation of income for period extending beyond the life expectancy of the grantor (*Shukert v. Allen, supra*); a simultaneous leasing back of premises to the donor (*Nicholas v. Coolidge, supra*); the reserved right to receive trust income after death of prior life income beneficiary (*May v. Heiner, supra*); a reservation of income of the trust for the life of the grantor (*Burnet v. Northern Trust Co., supra; Morsman v. Burnet, supra,* and *McCormick v. Burnet, supra*). In each case in the latter group, the Supreme Court held that the provision respecting distribution of income did not constitute a "string" bringing the transfer within the statute since

the transfer of the interest in the property sought to be included in the gross estate was absolute and complete when made.

In passing upon the taxability of gifts, the Supreme Court of the United States on November 6, 1939, held as follows:

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it become subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. Burnet v. Guggenheim, *supra* (288 U. S. 286, 77 L. Ed. 751, 53 S. Ct. 369). An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."
>
> *Sanford's Estate v. Commissioner,* 308 U. S. 39, 44, 84 L. Ed. 20-23.

Rehearing denied December 4, 1939; 308 U. S. 367. This decision was unanimous.

On December 6, 1939, the Supreme Court also decided the case of *Rasquin v. Humphreys*, 308 U. S. 54, 84 L. Ed. 77, in which they reiterated the principles of the *Sanford* case.

This decision was unanimous.

These cases definitely adopted as a fixed rule for determining taxability of a gift the same principle as for determining taxability for estate tax. That is, if the grantor retains a string on the property by which he retains control, it is not a gift and it is subject to tax in the estate. If the transfer is complete and the donor does not retain control over the property in himself, then it is a gift and is not subject to estate tax.

The opinion thus set forth in *Helvering v. Hutchins, supra,* was reiterated by the Supreme Court on March 3, 1942, after the *Hallock* case, in which the same underlying principle was followed and in which the Court cited the *Sanford* case and the *Rasquin* case.

> *Helvering v. Hutchins*, 312 U. S. 393, 85 L. Ed. 909.

This decision was unanimous.

The controlling principle of law followed in the foregoing cases is that no part of the value of property transferred in trust prior to March 3, 1931, not in contemplation of death, is includable in the grantor's gross estate under Section 302(c) of the Revenue Act of 1926, or similar prior statutory provisions, even though the grantor reserved to himself the income from the property for life, and regardless of whether he died before, on, or after March 3, 1931.

III.

The Transfer of the Interest Here Involved Was Complete and Irrevocable in 1923 When Made.

The trust in controversy was created August 15, 1923. By the terms of the trust instrument the trust property was transferred to the trustees without the retention by the trustor of any interest whatsoever in the corpus, without the retention of any power to alter or amend the trust in any manner whatsoever, without the retention of any right to change any beneficiary or the interest of any beneficiary, and without the retention of any right of reversion, contingent or otherwise. [Tr. pp. 19-27.] The trial court found the trust to be irrevocable. [Tr. pp. 46, 47, 51.]

Section 2280 of the Civil Code of California, in effect at the time of the creation of the trust, provided:

> "Sec. 2280. Not Revocable. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

Section 2280 of the Civil Code of California was amended in 1931, but the amendment specifically provided that "any trust created prior to the date when this act shall become a law shall not be affected thereby." Statutes 1931, p. 1955.

The trust instrument herein involved contained no provision for revocation, alteration, modification or cancellation [Tr. pp. 19-27, 47], and continued in full force until

its termination, by its terms, on the death of the wife Marian M. Brown on February 8, 1940 [Tr. p. 46], five years and six months after the death of the testator herein.

Appellant admits that the trust was irrevocable (Br. p. 3); and the trial court found:

> "That no right of alteration or amendment, or other right of revocation or control was retained by Frederick L. Brown, deceased, or his said wife. Marian M. Brown, deceased, either alone or with any other person." [Tr. p. 47.]

The transfer of the interest in property herein sought to be included in decedent's gross estate was absolute and complete in 1923, when made. Decedent retained no "string" whereby he could control thereafter, in any manner whatsoever, the disposition thereof.

Under the rule stated by the Supreme Court and set forth in part II of this brief, the transfer in the present case was not a transfer intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment thereof by the Joint Resolution of March 3, 1931.

The mere retention by the grantor of a portion of the trust income for life, is of no signficance. It does not bring the transfer within Section 302(c) as it read prior to the amendment.

Therefore, no portion of the value of the remainder interest is includable in the decedent's estate.

Appellant's contention that the grantor's reservation of a portion of the trust income to himself for life oper-

ates to bring the transfer within the meaning of Section 302(c) of the Revenue Act of 1926 as it stood prior to the amendment by the Joint Resolution of March 3, 1931 (Br. pp. 6, 10), is contrary to *May v. Heiner,* 281 U. S. 238, 74 L. Ed. 826; *Burnet v. Northern Trust Co.,* 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnet,* 283 U. S. 783, 75 L. Ed. 1412; *McCormick v. Burnet,* 283 U. S. 784, 75 L. Ed. 1413, and *Hassett v. Welch,* 303 U. S. 303, 82 L. Ed. 858, and to the converse of the rule as stated in *Klein v. United States,* 283 U. S. 231, 75 L. Ed. 996, and *Helvering v. Hallock,* 309 U. S. 106, 84 L. Ed. 604. The contention is also at variance with the legislative history of the amendment.

Furthermore, it may be noted that the income received by the grantor from the trust during his lifetime, or assets acquired therewith, constituted part of his gross estate, and to the extent of the value thereof at the time of his death were included in the return of estate tax.

The interest here in controversy is the *remainder* interest and that interest was finally and completely disposed of by the decedent in 1923 *inter vivos.* There was no retention of any "string" to that transfer.

Two recent decisions of the Board of Tax Appeals, *i. e., Estate of Edward Lathrop Ballard, Deceased, et al. v. Commissioner of Internal Revenue* promulgated October 1, 1942, and *Mabel Shaw Birkbeck Estate, et al. v. Commissioner,* promulgated October 6, 1942, sustain the contentions of appellee that Section 302(c) of the Revenue

Act of 1926, as amended is not retroactive and does not apply to the instant case, and that under said Section 302(c) of the Revenue Act of 1926, as it read prior to the amendment thereof in 1931, no part of the property of the trust here involved is properly included in decedent's gross estate for Estate Tax purposes.

> *Estate of Edward Lathrop Ballard, Dec'd. et al. v. Commissioner,* 47 B. T. A. Adv. Op. #107:
>
> *Mabel Shaw Birkbeck Estate, et al. v. Commissioner,* 47 B. T. A. Adv. Op. #109.

IV.

The Appellant's Conclusions Are Not Based Upon Facts and Are Not Supported by the Authorities Cited.

As to Appellant's (a):

1. The first point urged by appellant is that the ultimate disposition of the trust corpus was suspended during the lifetime of the decedent. In support thereof appellant relies upon the wording of the trust indenture which provides:

> "The trust hereby created shall terminate upon the death of the survivor * * * and *thereupon* the *title to* said *trust property shall vest absolutely* in equal shares in" his children. (Italics added.) [Tr. p. 24.]

Upon the execution of the trust, the title to the trust property passed completely from the trustor and vested in the trustees, as such, to be held by them as trustees for the benefit of the named beneficiaries, upon the conditions imposed upon them by the trust indenture.

The provision above quoted from the trust instrument could mean only, that upon the termination of the trust at the trustor's death or at the later death of his wife, the property would be freed from the control of the trustees, and the legal title held by the trustees would merge with the equitable title of the beneficiaries and become an absolute title in the beneficiaries.

If the appellants' argument were sound, there could never be an absolute and complete transfer of a remainder in trust, because the title thereto could never vest in the remaindermen until the termination of the trust. That such is not the case is evident from the many decisions referred to above.

Furthermore, recent pronouncements of the Supreme Court have established beyond argument the principle that in matters of taxation substance rather than form should govern.

> *Gregory v. Helvering,* 293 U. S. 465, 79 L. Ed. 596;
>
> *Helvering v. Clifford,* 309 U. S. 331, 84 L. Ed. 788;
>
> *Higgins v. Smith,* 308 U. S. 473, 84 L. Ed. 406.

The substance of the provision in question is only to the effect that upon termination of the trust, the property shall be delivered to the designated individuals. The Government's attempt to emphasize verbiage to the effect that disposition is suspended because of use of the words "Thereupon * * * title * * * shall vest * * *" finds no support in the judicial approach to questions of this type as manifested by the cases heretofore cited.

However, even conceding for purpose of argument that the ultimate recipient or recipients of the transferred property were unascertainable, such fact is totally immaterial. If the transfer is "immediate and out and out," it matters not that an interest "might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust."

> *Shukert v. Allen* (1927), 273 U. S. 545, 547, 71 L. Ed. 764, 766.

None of the cases cited by appellant in part (a) of its brief supports the view that the ultimate disposition of the trust corpus involved in the present case was suspended during the lifetime of the decedent.

2. Appellant argues that "the instant transfer was a substitute for a testamentary disposition in a very real sense since it provided for the distribution of the bulk of the grantor's property after death." and hence the statute was designed to reach and include the transfer. (Br. p. 7.)

The transfer in this case was not testamentary in character. The trial court specifically found that the transfer was not made in contemplation of death [Tr. pp. 47-48, 50], and the evidence on this point is without conflict. [Tr. pp. 62-66.]

Appellant's contention that the provision in the trust instrument, for distribution of the trust corpus after the death of the survivor of the decedent and his wife, makes the transfer testamentary in character and, hence within the statute, is at variance not only with the long line of Supreme Court decisions review in part II of this brief,

but also with the statements made on the floor of the House at the time of passage of the Joint Resolution of March 3, 1931. If appellant's contention were correct the amendment incorporated in the Joint Resolution would have been unnecessary. The amendment merely added the very thing which appellant now contends was already included in the section as it stood prior to the amendment. Appellant's contention clearly is untenable.

3. Appellant contends that its position "is supported by *Helvering v. Hallock*, 309 U. S. 106." (Br. p. 8.)

Helvering v. Hallock does not support appellant's position. In each of the three cases decided by the Court in *Helvering v. Hallock,* and in each of the three prior Supreme Court decisions reviewed therein, the possibility of reverter, which the Court fixed upon as the "string" warranting the inclusion of the value of the interest in the transferred assets under Section 302(c), arose as the result of specific provisions of the trust instrument. In the present case there was no reservation of any possibility of reversion, contingent or otherwise, in the trust instrument. The transfer was as absolute and complete when made as any man could make it. The appellant's claim that the *Hallock* case supports its position is patently unsound.

4. Appellant stated that "In the instant case there was a possibility of reverter, remote though it may have been * * *." (Br. p. 8.)

The facts of this case do not support appellant's statement. The decedent did not reserve to himself, either directly or indirectly, any reversionary interest whatsoever, contingent or otherwise. The trust instrument contains no

such provision. [Tr. pp. 19-27.] The only possibility that the grantor could ever become repossessed of the trust corpus, or any part thereof, would be by reason of failure of the trust due to the death of all beneficiaries,—three children, wives of two children, seven grandchildren, the possibility of additional grandchildren, and the possibility of other descendants of grandchildren—prior to that of the grantor. In such case only, the trust corpus would be returned to him by operation of law. Aside from the remoteness of such an infinitesimal possibility (there are no actuarial tables from which such a possibility can be determined), such a possibility of thus becoming repossessed of the trust property does not constitute the retention by the grantor of a reversionary interest.

If the government's interpretation of the statute viz,. that the infinitesimal chance that the grantor might survive all beneficiaries and thereupon recover the corpus of the trust by reason of its failure for lack of beneficiaries, brings the statute into operation, then, every transfer in trust no matter how completely made would be included under Section 302(c).

5. Appellant's statement that the *Hallock* case has not been restricted to its precise facts (Br. p. 9) is true, but when the rationale of that case is understood it is apparent that in all of the cases cited by the appellant to demonstrate its statement there has been no deviation from the principle adhered to in the *Hallock* case, and the preceding cases upon which it is based.

An examination of the cases cited fails to disclose anything which supports appellant's contention in the present controversy. We will analyze these cases:

Commissioner v. Clise, 122 Fed. (2d) 998 (C. C. A. 9th).

Nothing in that case lends any support to appellant's argument, and nothing in that case is in any way out of line with the decisions of the United States Supreme Court heretofore cited.

Commissioner v. Wilder's Estate, 118 Fed. (2d) 281 (C. C. A. 5th).

That case involved the purchase of an annuity contract out of community funds, the income during the life of the husband to be paid to him and after his death the income to be paid to his wife. The Court held that the wife owned one-half of the contract and that on the death of the husband the value of his one-half was transferred to her. This case did not involve a transfer prior to death, but was a transfer which took effect only upon death.

Chase National Bank v. United States, 116 Fed. (2d) 625 (C. C. A. 2d).

This case involved a paid up insurance policy and provided for the payment of the face of the policy to the insured's wife "if the beneficiary survived the insured, otherwise to the executors, administrators or assigns of the insured." In this case, as in the cases we have cited from the Supreme Court, the title remained in the insured until his death.

In this case, had the husband survived the wife, one-half of the face of the policy would have been taxable in her estate.

Commissioner v. Washer, 127 Fed. (2d) 446 (C. C. A. 6th).

This case involved insurance policies in which the wife was named beneficiary, but the testator reserved the right to change the other beneficiaries if the wife should predecease him. This, as well as the two preceeding cases involved insurance policies. They are not directly in point, but none of the decisions conflict in any way with the rules laid down by the Supreme Court heretofore cited.

Chase National Bank of New York v. Higgins, 38 Fed. Supp. 858 (S. D. N. Y.).

In this case the trustor, in 1927, gave property in trust, reserving the income for life, but also reserving the right to all or part of the corpus and in fact did invade the corpus during her life. The Court held that the 1931 amendment to Section 302(c) did not apply as it was not retroactive. The Court held the corpus taxable in the estate of the trustor because she retained a "string" in that only what remained of the corpus at her death was to pass to the beneficiary.

Nothing in this case conflicts with the rule laid down by the Supreme Court.

Van Vranken v. Helvering, 115 Fed. (2d) 709 (C. C. A. 2d).

This is an income tax case involving the determination of what constituted the basis for determining profits, and the Court held on the facts that the property was transferred to the beneficiary at the time of the decease of the testator and that the basis for determining future profits was the value at the time the testator died, as against a

claim that the basis was the value on the date of distribution. The case is in no way in point in any issue in controversy herein.

> *Helvering v. Le Gierse,* 312 U. S. 531, 85 L. Ed. 996.

This case involved certain insurance and annuity contracts. The Court said: "The 'insurance' policy contained the usual provision for surrender, assignment, optional modes of settlement, etc." Thus the control of the property was retained by the testatrix until her death. The policies were taken out in 1936. After deciding that the policies were not "insurance" the Court held the proceeds taxable in the following language:

> "The only remaining question is whether they are taxable.
>
> We hold that they are taxable under Sec. 302(c) of the Revenue Act of (February 26) 1926, as amended, as a transfer to take effect in possession or enjoyment at or after death. See Helvering v. Tyler (CCA 8th) 111 F. (2d) 422, 311 US 629, *ante,* 400, 61 S. Ct. 49; and Old Colony Trust Co. v. Commissioner of Internal Revenue (CCA 1st) 102 F. (2d) 380, *supra;* Kernochan v. United States, 89 Ct. Cl. 507, 29 F. Supp. 860; Guaranty Trust Co. v. Commissioner of Internal Revenue, 16 BTA(F) 314, *supra;* compare Gaither v. Miles (DC) 268 F. 692; Comment, 38 Mich. L. Rev. 526; Comment, 32 Ill. L. Rev. 223.'"

> *Helvering v. Le Gierse,* 312 U. S. 531, 542, 85 L. Ed. 996, 1000;

Commissioner v. Kellogg, 119 Fed. (2d) 54 (C. C. A. 3d).

Appellant contends that this decision was incorrectly decided.

This case is further cited at page 45, *infra*.

Nothing in the cases cited by the appellant and discussed above conflicts with the rule in the *Kellogg* case, which case followed *May v. Heiner,* 281 U. S. 238, 74 L. Ed. 826, and *Reinecke v. Northern Trust Co.,* 278 U. S. 339, 73 L. Ed. 410, both of which cases have heretofore been listed among the unanimous decisions of the United States Supreme Court which established the rule adopted in the *Hallock* case.

On October 1, 1942, the Board of Tax Appeals promulgated a decision citing the *Kellogg* case with approval in the following language:

> "The Circuit Court of Appeals for the Third Circuit, in *Commissioner v. Kellogg,* 119 Fed. (2d) 54, refused to extend the doctrine of *Helvering v. Hallock, supra,* to a case where the trust property transferred by the decedent might revert to the decedent not by virtue of the terms of the trust instrument but because of failure of the trust. The *Kellogg* case imposes a logical limitation on the scope of Section 302(c). We think that here, too, the application of the *Hallock* doctrine would cause an unwarranted extension of that section."

Estate of Edward Lathrop Ballard v. Commissioner, 47 B. T. A. Ad. Op. #107.

As to Appellant's (b):

Appellant's point (b) is that, because of the reservation of income for life, the transfer was intended to take effect at death to the extent that the decedent reserved an interest in the Trust Income. (Br. p. 9.)

1. Appellant states that it is not relying upon the retroactive application of the amendments made by the Joint Resolution of March 3, 1931, and by Section 803(a) of the Revenue Act of 1932; but is relying upon the wording of Section 302(c) of the Revenue Act of 1926, as it read prior to the amendments. (Br. p. 10.)

The same contention was considered and rejected by the Supreme Court in *May v. Heiner,* 281 U. S. 238, 74 L. Ed. 826; *Burnet v. Northern Trust Co.,* 283 U. S. 782, 75 L. Ed. 1412; Morsman v. Burnet, 283 U. S. 783, 75 L. Ed. 1412, and *McCormick v. Burnet,* 283 U. S. 784, 75 L. Ed. 1413.

And, in *Hassett v. Welch,* 303 U. S. 303, 82 L. Ed. 858, the Court necessarily approved of its prior decisions in those four cases because, otherwise it could not have held that the transfers were not within the statute as it stood prior to the amendments.

Appellant's contention, however, is based primarily upon the proposition that *May v. Heiner, Burnet v. Northern Trust Co., Morsman v. Burnet* and *McCormick v. Burnet* were overruled by *Helvering v. Hallock.* (Br. p. 11.)

Helvering v. Hallock did not overrule *May v. Heiner* or the other three cases above referred to, either directly or by implication. As pointed out hereinabove these cases are not in conflict with *Helvering v. Hallock.*

The problem in the *Hallock* case, as stated by the Court was the reconciliation of its prior decision in the *Klein* case with the two *St. Louis Union Trust Co.* cases. The Court said:

> "Neither here nor below does the issue turn on the unglossed text of Sec. 302(c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, Klein v. United States, 283 U. S. 231, 75 L. ed. 996, 51 S. Ct. 398; Helvering v. St. Louis Union Trust Co., 296 U. S. 39, 80 L. ed. 29, 56 S. Ct. 74, 100 A. L. R. 1239, and Becker v. St. Louis Union Trust Co., 296 U. S. 48, 80 L. ed. 35, 56 S. Ct. 78. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. 308 U. S. 532, 538, 543, ante, 448, 453, 458, 60 S. Ct. 82, 94, 141. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor upon a contingency terminable at his death. Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained, is the crux of the problem" (p. 110).
>
> "Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of Section 302(c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. Freed from the distinctions introduced by the St. Louis Union Trust Co. Cases, the Klein Case furnishes such a harmonizing principle" (p. 118).

> "We therefore reject as untenable the diversities taken in the St. Louis Union Trust Co. Cases in applying the Klein doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere" (p. 122).
>
> *Helvering v. Hallock*, 309 U. S. 106, 110, 118, 122, 84 L. Ed. 604, 607-8, 612, 614.

Furthermore, subsequent to *Helvering v. Hallock*, which was decided January 29, 1940, the courts have recognized the continuing effectiveness of *May v. Heiner, supra*, and *Hassett v. Welch, supra*, and have found no conflict in principle between those two cases and *Helvering v. Hallock, supra*. Appellant has cited no Court decisions to support his theory.

In *Blakeslee v. Smith*, 110 Fed. (2d) 364, decided March 18, 1940, the Circuit Court of Appeals for the Second Circuit stated:

> "We do not understand that the government is any longer contending that by this trust the settlor made a transfer of any property intended to take effect in possession or enjoyment at or after his death. Nor could it maintain that position under the law as declared in *May v. Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; which was followed by Burnet v. Northern Trust Co., 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; Morsman v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412; and McCormick v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413. Equally futile now would be any attempt to have the provisions of the statute as amended first by the Joint Resolution of March 3, 1931 and then by the Act of June 6, 1932,

26 U. S. C. A. Int. Rev. Code, 811, made applicable to any transfers previously made. That amendment is not retroactive. Hassett v. Welch, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858" (p. 366).

Again, in *Commissioner v. Flanders*, 111 Fed. (2d) 117, decided April 15, 1940, the same Circuit Court of Appeals said:

> "We agree also with the Board's conclusion that Trust No. 3 is not taxable under section 302(c) as a transfer to the remaindermen intended to take effect in possession or enjoyment at or after death. Since the trust was created prior to March 3, 1931, it is conceded that the corpus would not be includible in the settlor's gross estate merely because of the reservation of the life use of the income. Hassett v. Welch, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858" (p. 120).
>
> * * * * * * * *
>
> "A different situation is presented by Trust No. 4. There the settlor reserved a remainder contingent upon his surviving his two younger brothers whose lives measured the duration of the trust. In view of the decision of the Supreme Court in Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368, handed down January 29, 1940, we hold the settlor's possibility of reverter a taxable interest under Section 302(c)" (p. 121).

Commissioner v. Kellogg, 119 Fed. (2d) 54, decided March 20, 1941, a decision by the Circuit Court of Appeals for the Third Circuit, contains the following language:

> "The petitioner further contends that even if he is in error in urging that the corpus of the trust

> is includible in the grantor's estate under the principles of Helvering v. Hallock, none the less the transfer was a substitute for the testamentary disposition of the grantor and, in the words of the statute, was 'intended to take effect in possession or enjoyment at or after his death'. In short the petitioner relies on the exact language of the statute. His difficulty in sustaining this contention arises also with May v. Heiner and becomes insurmountable, so far as this court is concerned, when we contemplate the decision in Reinecke v. Northern Trust Co., 278 U. S. 339, 347-348, 49 S. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397. If the words of the statute just quoted are to receive the meaning contended for by the petitioner, they must receive it from the Supreme Court" (pp. 57-58).

The Circuit Court of Appeals for the Ninth Circuit, in *Commissioner v. Clise,* 122 Fed. (2d) 998, decided October 4, 1941, after referring to the decisions of the Supreme Court in *May v. Heiner, supra, Burnet v. Northern Trust Co., supra, Morsman v. Burnet, supra,* and *McCormick v. Burnet, supra,* decided on April 14, 1930; to the three cases, decided March 2, 1931, by the Supreme Court on the authority of *May v. Heiner, supra;* to the adoption of the Joint Resolution on March 3, 1931, and after having quoted from *Hassett v. Welch, supra,* decided by the Supreme Court in 1938 this Court gave consideration to *Chemical Bank & Trust Co.,* 37 B. T. A. 535, as the only decided case based on identical facts. After reciting briefly the facts in the *Chemical Bank* case to the effect that the decedent had purchased prior to March 3, 1931, two irrevocable annuity contracts, payable to himself so long as he should live, this Court

referred to and gave recognition to the effectiveness of *Hassett v. Welch* in the following language:

> "Although *Hassett v. Welch, supra*, had been decided approximately a month when the Board of Tax Appeals promulgated the above decision, and the writer of the Board's opinion was aware of it (cf. 37 B. T. A. 542), the Board did not treat the question of retroactive operation of the amendment to the Act in its discussion of this phase of the problem before it in the Chemical Trust case, *supra*.
>
> "We cannot approve the Board's reasoning in the Chemical Bank & Trust Case; the Board's view of the situation confronting it there does not coincide with ours. *Moreover, that case could have been* decided upon the authority of Hassett v. Welch, *supra*." (Italics ours) (p. 1003).

In *Central National Bank of Cleveland v. United States*, 41 Fed. Supp. 239, decided October 6, 1941, the Court of Claims made it plain that it did not deem *Helvering v. Hallock, supra*, to have overruled *May v. Heiner, supra*. The Court said:

> "In May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, the trust created a life estate in the settlor's husband and, after his death, if he predeceased her, a life estate in herself, with remainder in her children. The entire fee was disposed of by the instrument; the beneficiaries acquired no additional right by the settlor's death. At the grantor's death the beneficiaries came into the possession of the thing, title to which had already been given them. Hence, it was held there had been no transfer at death subject to the tax" (pp. 245-246).

It is particularly worth of note that the Court of Claims stated that under the authority of the *Hallock* case "We hold that an interest in the property transferred took effect in possession or enjoyment on the grantor's death" and stated further that it must follow from that and other cases referred to in the decision that "*the interest in the property which had already vested in the beneficiaries and which was not transmitted by death is to be excluded from the gross estate*" (p. 248). (Italics ours.)

These cases clearly establish the fact that all United States Circuit Courts of Appeals, which have had occasion to consider the question, and the United States Court of Claims have been unanimous in the conclusion that there is no conflict in principle between the cases of *May v. Heiner, Hassett v. Welch,* and *Helvering v. Hallock.* The same conclusion was reached by the District Court of New York in *Chase National Bank v. Higgins,* 38 Fed. Supp. 858, decided May 15, 1941, and the District Court of New Jersey in *Blunt v. Kelly,* 41 Fed. Supp. 721, decided November 8, 1941, as well as the court below in its decision in the present case.

Appellant cites the dissenting opinion of Mr. Justice Roberts in the *Hallock* case and the decision of the United States Board of Tax Appeals in the *Mary H. Hughes* case, 44 B. T. A. 1196 in support of its contention that *Helvering v. Hallock overruled May v. Heiner.* (Br. p. 11.) Obviously the majority in the *Hallock* case did

not share Mr. Justice Roberts' views as to the effect of the *Hallock* decision in this respect. The Court said:

> "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, *when such adherence involves collision with a prior doctrine* more embracing in its scope, intrinsically sounder, and verified by experience." (Italics added.)
>
> *Helvering v. Hallock*, 309 U. S. 105, 119, 84 L. Ed. 604, 612.

The prior doctrine referred to was the doctrine of the *Klein* case, 283 U. S. 231, 75 L. Ed. 996. The Court specifically so stated (pp. 118, 122). That the *Klein* case is in complete harmony with *Burnet v. Northern Trust Co.,* 283 U. S. 782, 75 L. Ed. 1412; *Morsman v. Burnet*, 283 U. S. 783, 75 L. Ed. 1412; and *McCormick v. Burnet,* 283 U. S. 784, 75 L. Ed. 1413, is quite evident when we consider the fact that all four of these cases were pending before the Court at the same time. The *Klein* case was *argued* February 27, 1931; the *Northern Trust Co., Morsman* and *McCormick* cases were decided March 2, 1931; and the *Klein* case was *decided* April 13. 1931. All of those decisions were unanimous. The three cases decided March 2, 1931, were decided specifically and solely upon the authority of *May v. Heiner.* The conclusion is inescapable that the Supreme Court itself considered *May v. Heiner* to be in harmony with the *Klein* case; and that *Helvering v. Hallock* was merely a re-application of the rule of the *Klein* case.

As to the *Hughes* case, *supra,* that decision could have been reached without the statement by the Board as to the effect of the *Hallock* case on *May v. Heiner.*

The facts were that Mary Hughes entered into a contract whereby the insurance company agreed to pay, during the life of her son Frank C. Hughes, a fixed sum monthly.

During Mrs. Hughes life this sum was to be paid to her. After her death it was to be paid to four children in equal parts with provisions for successor beneficiaries in case of death of any beneficiaries. The principal paid in belonged to the insurance company.

The contract provided that on the death of Frank C. Hughes at least $900,000.00 was to be paid to the named beneficiaries.

This was not a transfer in trust or otherwise. It was clearly a contract owned by Mrs. Hughes, whereby the insurance company agreed to pay to others at or after her death a sum of money of at least $900,000.00.

The contract further provided that should she survive the named beneficiaries the balance should be paid to her estate. She at all times owned the contract.

Moreover the *Hughes* case on appeal by the taxpayer to the Circuit Court of Appeals for the Seventh Circuit was dismissed by stipulation of the parties on agreed motion April 8, 1942, C. C. H., FINH. C. I. 3435, the government chosing to accept an amount much less than the asserted liability by way of compromise, rather than to submit the case to the Court on review. Inasmuch as that case was never affirmed by the Circuit Court of Appeals, it cannot be considered as authoritative. The Board

has not cited the case in any decision since the appeal was dismissed.

The appellant has cited two cases in which the *Hughes* case was cited by the United States Board of Tax Appeals prior to its dismissal on appeal, but in neither case did the decision rest upon it.

The case of *Corca C. Feynolds*, 45 B. T. A. 44, Adv. Op. #9 (C. C. H. #12064), decided September 5, 1941. The result arrived at by the Board in this case, *i. e.,* holding that the proceeds from this contracts were subject to tax is correct and is justified by the decisions of the Supreme Court. We do not agree with the reasoning of the Board as to the indivisibility of the contracts, but this question is not at issue here.

The facts in the *Reynolds* case were that three insurance policies were taken out by the decedent. The insurance policies were assigned to a trustee. They were assigned to the trustee purely and solely for the purpose of collection, after the death of the insured, and to make distribution of the proceeds, thereafter. The trustee was not given the power to surrender the policies or to borrow on the policies. Therefore, the death of the insured was the motivating act which completed the transfer of the policies from the donor to the trustee or the beneficiary.

This was a clear case in which the insured, by executing an irrevocable trust, definitely prevented the trustee or any one else from receiving the economic benefits of the policies during her life.

Had it been desirable to borrow on these policies it would have been necessary for the donor to have made an

additional transfer of that power. The donor did not make a completed gift of the contracts, but made a transfer of the title to the trustee conditioned on the trustee and beneficiary receiving the benefit of the policies only after the death of the insured.

In the *Estate of Frederick S. Fish*, 45 B. T. A. 120, Adv. Op. #21, (appeal C. C. A.—2 dismissed April 6. 1942, C. C. H. FINH, C. I. 3435) reciprocal trusts created prior to March 3, 1931, were under consideration. The Board applied the theory of *Lehman v. Commissioner*, 109 Fed. (2d) 99, and regarded the decedent as creator of the trust of which his wife was nominal grantor and in which he was life income beneficiary and had a power of appointment over the remainder. So viewed, the Board, relying on the *Hughes* case, *supra*, held the transfer includible and then added:

> "Even without regard to his retention of the income, decedent, again in the view that he was in effect the grantor, retained a power of appointment over the remainder which, whether exercised or not, subjects his estate to taxation under the provisions of section 302(c) and (d). *Commissioner v. Chase National Bank of New York* (C. C. A., 2d Cir.), 82 Fed. (2d) 157; certiorari denied, 299 U. S. 552; *Porter v. Commissioner*, 288 U. S. 436."

See:

Estate of Ballard, 47 B. T. A. Adv. Op. #107, October 1, 1942;

Birkbeck Estate, 47 B. T. A. Adv. Op. #109, October 6, 1942.

It is clear, therefore, that reliance on the *Hughes* cases was totally unnecessary in reaching the answer in the case.

As to Appellant's (c):

The third point urged by appellant is that, viewing the interests retained by the decedent as a whole, the transfer of the remainder interests took effect at decedent's death. Appellant relies upon *Helvering v. Clifford*, 309 U. S. 331, in support of its contention. (Br. p. 11.)

(It may be observed, parenthetically, that the retained life interests in the present case did not terminate upon decedent's death in 1934 but continued until Mrs. Brown's death in 1940.)

(1) The specific language used by appellant in urging this point is:

> "Experience with the doctrine of Helvering v. Clifford, 309 U. S. 331, demonstrates that the combination of several factors may result in tax consequences beyond those reached where one or more of the factors appears in isolation. That approach seems equally appropriate here. It is not necessary to consider the provisions of the trust indenture piecemeal." (Br. p. 11.)

We fail to understand appellant's language. He does not state what "experience" he refers to, nor does he cite any cases from which we can draw conclusions. If it is intended by this statement that the Court is to disregard the facts in the case and to read into the case the facts in the *Clifford* case and subsequent cases in which it is cited, we still fail to find anything in that case contrary to the contentions made herein. The case of *Helvering v. Clifford*, 309 U. S. 331, 84 L. ed. 788, was an income tax case construing Section 22a of the Revenue Act of 1934, in which a short term trust for a period of five years was

created, the trust instrument reserving to the grantor all of the powers over the property which he would have had if no trust had been created, and providing that the trust corpus upon the termination of the trust was to revert to the trustor. The Court said:

> "The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position."

Helvering v. Clifford, 309 U. S. 331-335, 84 L. Ed. 788, 791-2.

The case was decided February 26, 1940.

It will thus be observed that the rule followed in the *Clifford* case is the same rule as was followed in the long series of decisions of estate tax cases; that is, where the grantor retains in the trust instrument a reversionary interest in the corpus he remains the owner of the trust property.

In the present case the grantor reserved no power whatsoever over the trust corpus; the trust was not a short

term trust, and no reversionary interest was reserved in the trust instrument.

(2) Appellant makes a statement on page 12 of its brief that "no child could have any assurance that a share of the corpus would vest in him until the death of the decedent and his wife." Surely the appellant does not mean to contend that the rules of property have been so completely altered by the case of *Helvering v. Clifford* as to establish that a definite vested interest irrevocably created does not constitute a vesting in the beneficiaries, within the meaning of Section 302(c) of the Revenue Act of 1926.

A case similar to the one in controversy was decided by the Supreme Court February 24, 1931, three days before the *Klein* case was argued. In this case a grantor and his wife each transferred property in trust. The Supreme Court said:

> "By the deed of each grantor, one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in *praesenti* to be possessed and enjoyed by the sons upon the death of such survivor. (Citing cases.) The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of control over the principal; they had no power to revoke or modify the trust. Coolidge v. Loring (235 Mass. 223, 126 N. E. 276.) Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a

generating source of any right in the remaindermen. Knowlton v. Moore, 178 U. S. 41, 56, 44 L. ed. 969, 975, 20 S. Ct. 747. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. * * * The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it."

Coolidge v. Long, 282 U. S. 582, 597, 598, 75 L. Ed. 562, 567.

The thing which is subject to Federal estate tax is that which passes from the decedent or from his control at his death. In the case at bar, nothing passed by virtue of the death of the testator of the trust herein to any of the beneficiaries. Nothing whatever passed on the death of the grantor. The fact that any one of the children might be divested of his interest in the trust by his own death and his interest might thus be transferred to other beneficiaries of the trust, does not cause anything to pass on the death of the grantor of the trust. If one of these beneficiaries had died, his interest in that trust which passed on his death, might be subject to tax in his estate

but it is not subject to tax in the estate of Frederick L. Brown the trustor.

The contention of the appellant that the transfer of the remainder interests took effect at decedent's death is wholly without foundation.

Conclusion.

The trust here involved was irrevocable. The grantor did not reserve to himself any interest whatsoever in the trust corpus. He did not retain any power to alter or amend the trust instrument, or to change any trust beneficiary, or the interest of any beneficiary, nor did the trust instrument reserve to the grantor any right of reversion contingent or otherwise. His transfer of the property in trust was absolute and complete in 1923 when made. The transfer was not made in contemplation of death.

Under the rule established by a long line of unanimous decisions of the Supreme Court of the United States, and followed by that Court in its most recent decisions on the point, no part of the value of the trust corpus is includable in decedent's gross estate under the provisions of Section 302(c) of the Revenue Act of 1926 as it read prior to the amendment thereof by Joint Resolution of March 3, 1931, even though the grantor reserved to himself a portion of the trust income for life.

The decision of the Court below is in accordance with the law and should be affirmed.

Respectfully submitted,

Clark J. Milliron,

Attorney for Appellee.

APPENDIX.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) * * *

"(b) * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. * * *"

Sec. 302(c), Revenue Act of 1926.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth."

Sec. 302(c), Revenue Act of 1926, as amended by Public Resolution No. 131—71st Congress, March 3, 1931.

"(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"'(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth."

Sec. 803(a), Revenue Act of 1932.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment V, Constitution of the United States.

Amendment of the Revenue Act of 1926.

Mr. Hawley: Mr. Speaker, I ask unanimous consent for the present consideration of a joint resolution (H. J. Res. 529) relating to the revenue, reported from the Committee on Ways and Means.

The clerk read as follows:

House Joint Resolution 529.

Resolved, etc., That the first sentence of subdivision (c) of section 302, of the revenue act of 1926, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom: except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

The Speaker: Is there objection?

Mr. Schafer of Wisconsin. Reserving the right to object, and I shall object unless the gentleman explains just what the bill is.

Mr. Hawley. Mr. Speaker and gentlemen, the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his

heirs—the Supreme Court held that it goes to his heirs free of any estate tax.

This resolution is to provide that hereafter such shall not be the law. This decision will cost the Treasury of the United States $25,000,000. That is, it will necessitate refunds in that amount. The Treasury does not know how many such trusts will be found before Congress meets again, but the opinion is that a great many will be, and it will take a very large sum from the Treasury unless this corrective legislation is enacted.

Mr. Schafer of Wisconsin. This is a bill to tax the rich man. I shall not object.

Mr. Collins. I would like to have a little more explanation.

Mr. Sabath. Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?

Mr. Hawley. It provides that hereafter no such method shall be used to evade the tax.

Mr. Sabath. That is good legislation.

Mr. Hawley. Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases —Burnet against Northern Trust Co., Moraman against Burnet, and McCormick against Burnet—in which the court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for his life, with remainder to others after his death, the value of the property should not be included in the estate

of the donor for purposes of Federal estate tax upon his death.

Section 302 (c) of the revenue act of 1926 provides, as follows:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of or intended to take effect in possession or enjoyment at or after his death except in a case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children after his death, but in the meantime reserved the use, income, and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the Federal estate tax.

It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will pro-

ceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.

Washington, March 3, 1931.

My Dear Mr. Speaker: The Supreme Court of the United States has recently had before it the following three cases:

1. A places property in trust by a deed which provides that the income shall be paid to B for his life, then to A for her life, and then that the trust shall terminate upon the death of A, at which time the property shall be distributed among the children of A. (May v. Heiner.)

2. A places property in trust by a deed which provides that the income therefrom shall be paid to A for her life and upon her death that the trust shall terminate and the property shall be distributed among her children. (Burnet v. Northern Trust Co., executor of Van Schaick.)

3. A places property in trust by a deed which provides that A shall have the right to call upon the income therefrom to supplement her income from other property if it falls below a given sum; reserves the right to dispose of the remainder of the income by ordering payments to others and which further provides that the trust shall terminate upon the death of the last of her three children, at which time, if A is surviving, the property will be paid over to her, and, if not, will then be paid to the issue of her children. (McCormick v. Burnet.)

The Supreme Court by decisions rendered yesterday afternoon in the Van Schaick and McCormick cases, following its decision in the case of May v. Heiner, held that the value of the property comprising each of the foregoing three trusts, at the date of A's death, was not to be included in the decedent's gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death."

The effect of these decisions is that transfers of this character are held not to be within the language of section 302 (c) of the revenue act of 1926, or of prior acts having similar language, as follows:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

It is believed desirable, in view of the character of these transfers and in order to prevent tax evasion, that they be included in the statute. The Treasury has, therefore, drafted a proposed joint resolution, which is inclosed, amending the statute so as to include such transfers.

Without this amendment, the Federal estate tax will be seriously affected. It has been estimated that the effect of these Supreme Court decisions will be to cause a loss in excess of one-third of the revenue derived from the

Federal estate tax, with anticipated refunds of in excess of $25,000,000. While it is realized that very little time remains at this session, it is hoped that the Congress may take action by joint resolution to correct this situation.

Very truly yours,

OGDEN L. MILLS,
Acting Secretary of the Treasury.

The honorable the Speaker of the House of Representatives.

The Speaker. Is there objection to the consideration of the resolution?

There was no objection.

The resolution was agreed to.

Mr. Garner. Mr. Speaker, I ask unanimous consent to make a statement for three minutes on the resolution just passed.

The speaker. Is there objection?

There was no objection.

Mr. Garner. Mr. Speaker, ladies and gentlemen, so that the next Congress may realize this situation and may have an opportunity to think it over, I want to say that the Supreme Court yesterday handed down a decision in which it held that a trust made by a person of great wealth, say $500,000,000, could provide for the income of it for his life and that all of the property at a certain time shall go to his children and escape the tax.

The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason

that we were afraid that the Senate would not agree to it. But I do hope that when this matter is considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive.

The Treasurer estimates that there will be a refund of $25,000,000 to those who have died and had their estate taxed. What we hope in this resolution is to stop up this gap in the future. I hope in the next Congress a bill may be passed that will reach back and let the Supreme Court have one more guess. I use that word advisedly, they did guess and gave the exemption to these people who have made these trusts.

Mr. LaGuardia. This is to give timely notice that in the next Congress it will be made retroactive?

Mr. Garner. I have strong hopes that the next Congress will make it retroative.

Mr. Black. Was the Supreme Court decision based on a constitutional question, or a discussion of the statute?

Mr. Garner. It was on the statute itself, and was not constitutional.

Congressional Record—House, pp. 7198, 7199, March 3, 1931.

"*To Collectors of Internal Revenue and Others Concerned:*

"Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10.30 p. m., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including*

a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

"In view of the decisions of the Supreme Court of the United States in *Nichols v. Coolidge* (274 U. S. 531 (T. D. 4072, C. B. VI-2, 351)), *May v. Heiner* (281 U. S. 238 (Ct. D. 186, C. B. IX-1, 382)), *Coolidge v. Long* (282 U. S. 582), *Burnet v. Northern Trust Co.* (51 S. Ct. 342), *Edgar M. Morsman, Jr., v. Burnet* (51 S. Ct. 343) and *Cyrus H. McCormick v. Burnet* (51 S. Ct. 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of Section 302(h) of that Act, be applied *prospectively* only, i. e., to such transfers coming within the amendment as were made *after* 10.30 p. m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

David Burnet,
Commissioner of Internal Revenue."

Approved May 22, 1931.

A. W. Mellon,
Secretary of the Treasury.

T. D. 4314. C. B. X-1 450-451.

"Sec. 2280. Not Revocable. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

> Sec. 2280, Civil Code of California, in effect prior to June 15, 1931.

"Sec. 2280. Revocation of Trusts. Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be effected hereby."

> Sec. 2280, Civil Code of California, as amended June 15, 1931; Stats. 1931, p. 1955.